

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LORRAINE A. TORRES,

Plaintiff,

v.

CAROLYN W. COLVIN,
Acting Commissioner of
Social Security Administration,

Defendant.

3:14-cv-00113-RCJ-WGC

**REPORT & RECOMMENDATION OF
U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Plaintiff Lorraine A. Torres's Motion for Reversal and/or Remand. (Docs. # 17 (Notice), # 17-1 (Pl.'s Br.).)¹ The Commissioner filed a Cross-Motion to Affirm and Response to Plaintiff's Motion for Reversal and/or Remand. (Docs. # 18/19.)² Plaintiff filed a reply. (Doc. # 20.)

After a thorough review, the court recommends that Plaintiff's motion be denied and that the Commissioner's cross-motion to affirm be granted.

I. BACKGROUND

Plaintiff protectively filed applications for Social Security Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) on April 6, 2010, alleging disability since April 30, 2008, due to depression, anxiety, kidney problems, arthritis, and apnea. (Administrative Record (AR) 172-178, 180-89.) The applications were denied initially and on reconsideration. (AR 124-128, 131-137.)

¹ Refers to court's docket number.

² These documents are identical.

1 Plaintiff made a timely request for a hearing before an Administrative Law Judge (ALJ).
2 (AR 138-39.) On February 13, 2012, Plaintiff appeared, represented by counsel, for a hearing
3 before the ALJ. (AR 80-114.) The ALJ took testimony from Plaintiff and a vocational expert.
4 (*Id.*) On March 1, 2012, the ALJ issued a decision finding Plaintiff not disabled. (AR 15-27.)
5 Plaintiff appealed (AR 12-13) and the Appeals Council denied review on July 26, 2013. (AR 6-
6 11.) Thus, the ALJ's decision became the final decision of the Commissioner.

7 Plaintiff now appeals the decision to the district court. (Doc. # 17-1.) Plaintiff argues:
8 (1) the ALJ improperly found that Plaintiff's mental impairments of post-traumatic stress
9 disorder (PTSD), anxiety and depression were not severe at step two of the sequential evaluation
10 process; (2) two of the three jobs the ALJ identified as past relevant work are not past relevant
11 work as that term is defined in agency regulations, and the remaining position is a skilled,
12 socially-intensive job precluded by Plaintiff's mental limitations; and (3) the ALJ's alternative
13 step five finding is in error because all of the identified jobs are unskilled light jobs, and Plaintiff
14 must be found disabled under agency rules if she is limited to unskilled light work. (Doc. # 17-
15 1.)

16 In her first argument, Plaintiff contends that the ALJ's finding that her mental
17 impairments were not severe at step two is contrary to every medical opinion in the record,
18 establishing that the ALJ improperly substituted her judgment for those of the physicians. (Doc.
19 # 17-1 at 3.) She contends that her depression, anxiety and PTSD stem from being battered as
20 well as a tragic event that occurred in 1993 when her ex-husband murdered her thirteen year old
21 son, her mentally disabled brother-in-law and attempted to murder her other two children. (*Id.* at
22 4.) Since this event, she has struggled with depression, anxiety and PTSD. (*Id.*) State examining
23 psychologist, Dr. Robert Wildman, II, identified several moderate functional restrictions
24 resulting from Plaintiff's mental impairments, including moderate limitations in her ability to
25 interact appropriately with co-workers, supervisors and the public and in her ability to maintain
26 concentration and attention. (*Id.* at 4-5.) These limitations were confirmed by State agency
27 reviewing psychologist, Dr. Susan Kotler. (*Id.* at 5.)
28

1 In her second argument, Plaintiff addresses the ALJ's finding at step four that she could
2 return to past relevant work as a housekeeper, floor clerk and apartment management. (*Id.* at 6.)
3 Plaintiff initially argues that the ALJ's finding that Plaintiff could return to past relevant work as
4 a housekeeper is in error because this job is beyond the fifteen-year regulatory window and
5 cannot be considered past relevant work. (*Id.* at 7.) Next, she argues that the job of floor clerk
6 was not performed at a substantial gainful activity level and cannot be considered as past
7 relevant work. (*Id.* at 7-8.) Finally, she asserts that the remaining past relevant job of apartment
8 manager is a skilled and socially-intensive job that involves considerable interaction with others
9 and should be excluded or analyzed in light of Plaintiff's mental limitations. (*Id.* at 8-9.)

10 In her third argument, Plaintiff asserts that while the ALJ found Plaintiff had a residual
11 functional capacity for medium work, all of the jobs identified in the ALJ's alternative step five
12 finding were unskilled light jobs, and under the regulations, an individual who is fifty-five or
13 older and can perform only light jobs must be found disabled as a matter of law in the absence of
14 transferable skills that allow the performance of more than unskilled work. (Doc. # 17-1 at 10.)
15 She contends that unskilled jobs identified by the VE and ALJ do not use skills (transferable or
16 otherwise), and skills can only be transferred to skilled or semi-skilled work, and even if there
17 were transferable skills, a finding of disability is required for Plaintiff's age unless she has skills
18 readily transferable to a significant range of skilled or semi-skilled work. (*Id.*)

19 The Commissioner, on the other hand, first argues that the ALJ properly found Plaintiff's
20 mental impairments were not severe at step two, as the record indicated only sporadic complaints
21 of depression and PTSD stemming from a family tragedy in 1993 and Plaintiff was able to work
22 as an apartment and hotel manager from 1993 to 2007 and a floor clerk from 2007 to 2008;
23 therefore, her mental health issues did not impair her ability to work. (Docs. # 18/19 at 4.) To the
24 extent the court finds the ALJ erred in finding the mental impairments were not severe, the
25 Commissioner argues this error was harmless because the doctors who assessed Plaintiff's
26 mental limitations concluded that despite some mild and moderate limitations, she could still
27 perform simple, repetitive tasks which is consistent with the ALJ's finding that she could
28 perform her past relevant work as a housekeeper and floor clerk. (*Id.* at 5-6.)

1 Second, the Commissioner argues that the ALJ, relying on the VE's testimony, properly
2 concluded Plaintiff could perform past relevant work as a housekeeper, resident manager, and
3 floor clerk. (*Id.* at 6-8.) The ALJ found Plaintiff performed all of this work within fifteen years of
4 her alleged onset date of April 30, 2008. With respect to Plaintiff's argument that she did not
5 perform work as a housekeeper within fifteen years of the ALJ's decision (so it cannot count as
6 past relevant work), the Commissioner argues that the regulations provide that while the agency
7 does not normally consider work outside the fifteen year window, the important consideration is
8 whether the job has materially changed after fifteen years. (*Id.* at 6-7.) The Commissioner
9 contends that Plaintiff has not demonstrated she could not work as a housekeeper. (*Id.* at 7.)

10 Insofar as Plaintiff argues that her earnings for her past relevant work as a floor clerk did
11 not reach the substantial gainful activity requirements for the relevant time period, the
12 Commissioner argues that even if the ALJ erred in this regard any error is harmless because
13 earnings are just one factor, and are not conclusive in determining past relevant work. (*Id.*) In
14 addition, the Commissioner contends that Plaintiff was also able to perform several other jobs at
15 substantial gainful activity levels which reinforces the ALJ's conclusion that Plaintiff was
16 generally capable of performing substantial gainful activity.

17 With respect to the remaining resident manager position, and Plaintiff's argument that her
18 mental limitations would preclude her from performing this position, the Commissioner contends
19 that Plaintiff is not a vocational expert capable of making such a determination. (*Id.* at 8.) The
20 Commissioner asserts that the ALJ properly relied on the VE's testimony in finding that Plaintiff
21 could perform past relevant work as a resident manager. (*Id.*)

22 Finally, as to Plaintiff's last argument, the Commissioner initially states that the ALJ
23 elicited testimony from the VE that a hypothetical person with Plaintiff's limitations could
24 perform the other jobs of storage facility clerk, officer helper, and information clerk. (*Id.* at 9.) In
25 addition, the Commissioner contends that the jobs identified were examples of representative
26 occupations Plaintiff could perform and did not represent all jobs in the national economy
27 Plaintiff could perform. (*Id.*) Plaintiff contends that Grid Rules 202.04 and 202.06 require a
28 finding of disability, but the Commissioner argues that these rules only apply if Plaintiff were

1 limited to light exertional work and Plaintiff was limited to medium work. (*Id.*) Alternatively, if
 2 the ALJ did err in her step five finding, the error is harmless since the ALJ concluded Plaintiff
 3 could perform past relevant work at step four.

4 **II. STANDARD OF REVIEW**

5 The court must affirm the ALJ's determination if it is based on proper legal standards and
 6 the findings are supported by substantial evidence in the record. *Gutierrez v. Comm'r Soc. Sec.*
 7 *Admin.*, 740 F.3d 519, 522 (9th Cir. 2014) (citing 42 U.S.C. § 405(g)). "Substantial evidence is
 8 'more than a mere scintilla but less than a preponderance; it is such relevant evidence as a
 9 reasonable mind might accept as adequate to support a conclusion.'" *Gutierrez*, 740 F.3d at 523-
 10 24 (quoting *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir. 2012)).

11 To determine whether substantial evidence exists, the court must look at the record as a
 12 whole, considering both evidence that supports and undermines the ALJ's decision. *Gutierrez*,
 13 740 F.3d at 524 (citing *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001)). The court "'may
 14 not affirm simply by isolating a specific quantum of supporting evidence.'" *Garrison v. Colvin*,
 15 759 F.3d 995, 1009 (9th Cir. 2014) (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035
 16 (9th Cir. 2007)). "'The ALJ is responsible for determining credibility, resolving conflicts in
 17 medical testimony, and for resolving ambiguities.'" *Id.* (quoting *Andrews v. Shalala*, 53 F.3d
 18 1035, 1039 (9th Cir. 1995)). "If the evidence can reasonably support either affirming or
 19 reversing, 'the reviewing court may not substitute its judgment' for that of the Commissioner."
 20 *Gutierrez*, 740 F.3d at 524 (quoting *Reddick v. Chater*, 157 F.3d 715, 720-21 (9th Cir. 1996)).
 21 That being said, "a decision supported by substantial evidence will still be set aside if the ALJ
 22 did not apply proper legal standards." *Id.* (citing *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d
 23 1219, 1222 (9th Cir. 2009); *Benton v. Barnhart*, 331 F.3d 1030, 1035 (9th Cir. 2003)). In
 24 addition, the court will "review only the reasons provided by the ALJ in the disability
 25 determination and may not affirm the ALJ on a ground upon which he did not rely." *Garrison*,
 26 759 F.3d at 1010 (citing *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003)).

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III. DISCUSSION

A. Five-Step Sequential Process

Under the Social Security Act, "disability" is the inability to engage "in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(A). A claimant "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." 42 U.S.C. § 1382c(a)(3)(b).

The Commissioner has established a five-step sequential process for determining whether a person is disabled. 20 C.F.R. § 404.1520 and § 416.920; *see also Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987). If at any step the Social Security Administration (SSA) can make a finding of disability or nondisability, a determination will be made and the SSA will not further review the claim. 20 C.F.R. § 404.1520(a)(4) and § 416.920(a)(4); *see also Barnhart v. Thomas*, 540 U.S. 20, 24 (2003). "The burden of proof is on the claimant at steps one through four, but shifts to the Commissioner at step five." *Garrison*, 759 F.3d at 1011 (quoting *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009)).

In the first step, the Commissioner determines whether the claimant is engaged in "substantial gainful activity"; if so, a finding of nondisability is made and the claim is denied. 20 C.F.R. § 404.1520(a)(4)(i), (b); § 416.920(a)(4)(i); *Yuckert*, 482 U.S. at 140. If the claimant is not engaged in substantial gainful activity, the Commissioner proceeds to step two.

The second step requires the Commissioner to determine whether the claimant's impairment or a combination of impairments are "severe." 20 C.F.R. § 404.1520(a)(4)(ii), (c) and § 416.920(a)(4)(ii); *Yuckert*, 482 U.S. at 140-41. An impairment is severe if it significantly limits

1 the claimant's physical or mental ability to do basic work activities. *Id.* Basic work activities are
 2 "the abilities and aptitudes necessary to do most jobs[.]" which include:

3 (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling,
 4 reaching, carrying, or handling; (2) Capacities for seeing, hearing, and speaking;
 5 (3) Understanding, carrying out, and remembering simple instructions; (4) Use of
 judgment; (5) Responding appropriately to supervision, co-workers and usual
 work situations; and (6) Dealing with changes in a routine work setting.

6 20 C.F.R. § 404.1521 and § 416.921. If a claimant's impairment is so slight that it causes no
 7 more than minimal functional limitations, the Commissioner will find that the claimant is not
 8 disabled. 20 C.F.R. § 404.1520(a)(4)(ii), (c) and 416.920(a)(ii). If, however, the Commissioner
 9 finds that the claimant's impairment is severe, the Commissioner proceeds to step three. *Id.*

10 In the third step, the Commissioner looks at a number of specific impairments listed in
 11 20 C.F.R. Part 404, Subpart P, Appendix 1 (Listed Impairments) and determines whether the
 12 impairment meets or is the equivalent of one of the Listed Impairments. 20 C.F.R.
 13 § 404.1520(a)(4)(iii), (d) and § 416.920(a)(4)(iii), (c). The Commissioner presumes the Listed
 14 Impairments are severe enough to preclude any gainful activity, regardless of age, education, or
 15 work experience. 20 C.F.R. § 404.1525(a). If the claimant's impairment meets or equals one of
 16 the Listed Impairments, and is of sufficient duration, the claimant is conclusively presumed
 17 disabled. 20 C.F.R. § 404.1520(a)(4)(iii), (d), § 416.920(d). If the claimant's impairment is
 18 severe, but does not meet or equal one of the Listed Impairments, the Commissioner proceeds to
 19 step four. *Yuckert*, 482 U.S. at 141.

20 At step four, the Commissioner determines whether the claimant can still perform "past
 21 relevant work." 20 C.F.R. § 404.1520(a)(4)(iv), (e), (f) and § 416.920(a)(4)(iv), (e), (f). Past
 22 relevant work is that which a claimant performed in the last fifteen years, which lasted long
 23 enough for him or her to learn to do it, and was substantial gainful activity. 20 C.F.R.
 24 § 404.1565(a) and § 416.920(b)(1).

25 In making this determination, the Commissioner assesses the claimant's residual
 26 functional capacity (RFC) and the physical and mental demands of the work previously
 27 performed. *See id.*; 20 C.F.R. § 404.1520(a)(4); *see also Berry v. Astrue*, 622 F.3d 1228, 1231
 28 (9th Cir. 2010). RFC is what the claimant can still do despite his or her limitations. 20 C.F.R.

1 § 1545 and § 416.945. In determining RFC, the Commissioner must assess all evidence,
 2 including the claimant's and others' descriptions of limitation, and medical reports, to determine
 3 what capacity the claimant has for work despite the impairments. 20 C.F.R. § 404.1545(a) and
 4 § 416.945(a)(3).

5 A claimant can return to previous work if he or she can perform the "actual functional
 6 demands and job duties of a particular past relevant job" or "[t]he functional demands and job
 7 duties of the [past] occupation as generally required by employers throughout the national
 8 economy." *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001) (internal quotation marks and
 9 citation omitted).

10 If the claimant can still do past relevant work, then he or she is not disabled for purposes
 11 of the Act. 20 C.F.R. § 404.1520(f) and § 416.920(f); *see also Berry*, 62 F.3d at 131 ("Generally,
 12 a claimant who is physically and mentally capable of performing past relevant work is not
 13 disabled, whether or not he could actually obtain employment.").

14 If, however, the claimant cannot perform past relevant work, the burden shifts to the
 15 Commissioner to establish at step five that the claimant can perform work available in the
 16 national economy. 20 C.F.R. § 404.1520(e) and § 416.290(e); *see also Yuckert*, 482 U.S. at 141-
 17 42, 144. This means "work which exists in significant numbers either in the region where such
 18 individual lives or in several regions of the country." *Gutierrez*, 740 F.3d at 528. If the claimant
 19 cannot do the work he or she did in the past, the Commissioner must consider the claimant's
 20 RFC, age, education, and past work experience to determine whether the claimant can do other
 21 work. *Yuckert*, 482 U.S. at 141-42. The Commissioner may meet this burden either through the
 22 testimony of a vocational expert or by reference to the Grids. *Tackett v. Apfel*, 180 F.3d 1094,
 23 1100 (9th Cir. 1999).³

24 ³ "The grids are matrices of the four factors identified by Congress—physical ability, age, education, and work
 25 experience—and set forth rules that identify whether jobs requiring specific combinations of these factors exist in
 26 significant numbers in the national economy." *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th
 27 Cir. 2010) (internal quotation marks and citation omitted). The Grids place jobs into categories by their physical-
 28 exertional requirements, and there are three separate tables, one for each category: sedentary work, light work, and
 medium work. 20 C.F.R. Part 404, Subpart P, Appx. 2, § 200.00. The Grids take administrative notice of the
 numbers of unskilled jobs that exist throughout the national economy at the various functional levels. *Id.* Each grid
 has various combinations of factors relevant to a claimant's ability to find work, including the claimant's age,
 education and work experience. *Id.* For each combination of factors, the Grids direct a finding of disabled or not
 disabled based on the number of jobs in the national economy in that category. *Id.*

1 If at step five the Commissioner establishes that the claimant can do other work which
 2 exists in the national economy, then he or she is not disabled. 20 C.F.R. § 404.1566. Conversely,
 3 if the Commissioner determines the claimant unable to adjust to any other work, the claimant
 4 will be found disabled. 20 C.F.R. § 404.1520(g); *see also Lockwood*, 616 F.3d at 1071;
 5 *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009).

6 **B. ALJ's Findings in this Case**

7 In the present case, the ALJ applied the five-step sequential evaluation process and found
 8 at step one that Plaintiff had not engaged in substantial gainful activity since her alleged onset
 9 date of April 30, 2008. (AR 20.)

10 At step two, the ALJ found it was established Plaintiff suffered from the following severe
 11 impairments: degenerative joint disease, osteoarthritis and obesity. (AR 20.) The ALJ stated,
 12 *inter alia*, that Plaintiff's medically determinable mental impairments of depression and PTSD
 13 do not cause more than minimal limitation on Plaintiff's ability to perform basic mental work
 14 activities; and therefore, found them to be non-severe. (AR 21.) In coming to this conclusion, the
 15 ALJ found Plaintiff had no limitations in activities of daily living as Plaintiff lived with and
 16 cared for her son, was able to handle money, care for herself, cook, clean, shop in stores, drive
 17 and sew. (AR 21.) Next, the ALJ stated that Plaintiff has only mild limitations in social
 18 functioning as she spends time with her family, speaks with her daughter who lives in Los
 19 Angeles, and there is no evidence she has difficulty interacting appropriately with others as she
 20 worked as an apartment manager for thirteen years which involved the development of customer
 21 service skills. (AR 21.) The ALJ likewise found Plaintiff only has mild limitation in
 22 concentration, persistence or pace, pointing to Plaintiff's ability to concentrate well enough to
 23 sew, watch television, cook, drive and read, and indicated that her work history showed her
 24 concentration capability despite episodic symptoms of PTSD and depression. (AR 21.) Finally,
 25 the ALJ said Plaintiff had no episodes of decompensation of extended duration. (AR 21.)

26 At step three, the ALJ concluded Plaintiff did not have an impairment or combination of
 27 impairments that meet or medically equal the severity of one of the Listed Impairments. (AR 22.)

1 At step four, the ALJ found Plaintiff has the RFC to perform medium work as defined in
2 20 C.F.R. § 404.1567(c) and 416.967(c) with no climbing and occasional balancing, crouching,
3 crawling, kneeling, and stooping; and no concentrated exposure to unprotected heights and
4 dangerous moving machinery. (AR 22.) Initially, the ALJ noted Plaintiff claimed disability due
5 to both physical and mental impairments. (AR 23.) Physically, she alleged pain in her back and
6 lower extremities, problems sleeping, inability to sit, stand or walk for extended periods and
7 inability to lift or carry more than fifteen pounds. (AR 23.) Mentally, she alleged frequent
8 thoughts about a family tragedy in 1993, resulting in difficulties concentrating and interacting
9 with others. (AR 23.)

10 Insofar as this report and recommendation is concerned, the ALJ stated that Plaintiff's
11 records related to her mental impairments showed sporadic complaints of depression and PTSD
12 stemming from a family tragedy in 1993 where Plaintiff's then-husband murdered her son and
13 severely injured her other children. (AR 24.) The ALJ stated that following this incident,
14 Plaintiff had episodic symptoms of PTSD and depression. (AR 24.) The ALJ pointed to the fact
15 that despite her symptoms, Plaintiff was able to work as an apartment and hotel manager from
16 1993 to 2007, and a floor clerk from 2007 to 2008, and continued to look for work from 2008
17 through 2010. (AR 24.) Plaintiff testified that she cared for her disabled son. (AR 24.) The ALJ
18 concluded that the evidence demonstrated that Plaintiff's mental symptoms did not significantly
19 interfere with her ability to work, and noted that since her April 2008 onset date there were no
20 significant mental health treatment notes showing any worsening of her condition. (AR 24.)

21 The ALJ then assigned "little weight" to the opinion of Dr. Wildman, who found Plaintiff
22 mildly to moderately impaired in her ability to interact appropriately with coworkers, supervisors
23 and the public. (AR 25.) The ALJ explained that she thought Dr. Wildman overlooked Plaintiff's
24 past work history and activities of daily living, stating that she worked as an apartment and hotel
25 manager for fourteen years, demonstrating an ability to interact appropriately with others and
26 concentrate well enough to perform the tasks required of the position. (AR 25.) In addition, the
27 ALJ highlighted Plaintiff's activities of daily living, including caring for her disabled son,
28 cooking, cleaning, driving, shopping in stores and sewing. (AR 25.) The ALJ noted that the State

1 agency psychological consultants also found Plaintiff had moderate limitations in social
2 functioning and concentration, persistence and pace, but assigned them “little weight,” for the
3 same reasons as those discussed with respect to Dr. Wildman. (AR 25.)

4 The ALJ then concluded Plaintiff was capable of performing past relevant work as an
5 apartment manager, floor clerk and housekeeper. (AR 25.) All of these jobs are categorized as
6 light work. (AR 25.) The ALJ stated that Plaintiff’s prior work was within fifteen years of her
7 alleged onset date. (AR 25.) The ALJ also indicated that Plaintiff’s earnings activity for these
8 jobs exceeded the substantial gainful activity requirements for the relevant time periods. (AR
9 25.) Thus, she found they qualified as PRW pursuant to Social Security Ruling 82.62. (AR 25.)
10 The ALJ indicated that the VE testified that Plaintiff is capable of performing these past relevant
11 work positions. (AR 25.)

12 The ALJ then made an alternative finding at step five that Plaintiff could perform jobs
13 that exist in the national economy in significant numbers. (AR 26.) The ALJ considered
14 Plaintiff’s age, which she stated was fifty-nine as of the alleged onset date (noting that she
15 changed categories to closely approaching retirement age), her high school education and ability
16 to communicate in English, her acquired work skills from past relevant work, and RFC. (AR 26.)
17 The VE testified that Plaintiff’s past relevant work as an apartment manager was semi-skilled
18 with a specific vocational preparation score of five and required skills of managing funds,
19 customer service and supervisory skills. (AR 26.) In addition, the ALJ found Plaintiff acquired
20 work skills from past relevant work that were transferable to other occupations with jobs existing
21 in significant numbers in the national economy. (AR 26.)

22 Based on this information and Plaintiff’s RFC, age and education, the VE testified that
23 representative occupations that Plaintiff can perform include: storage clerk, DOT 295.367-026
24 (light work with SVP 2); office helper, DOT 239.367-010 (light work with SVP 2); and
25 information clerk, DOT 237.367-018 (light work with SVP 2).

26 The ALJ stated that while Plaintiff’s additional limitations would not allow her to
27 perform the full range of medium work, considering her age, education and transferable work
28

1 skills, a finding of not disabled is appropriate under the Grids, Rule 203.16 and 203.08. (AR 26-
2 27.)

3 **C. Step Two-Mental Impairments**

4 Plaintiff first argues that the ALJ erred in finding that Plaintiff's mental impairments
5 were not severe at step two of the sequential analysis.

6 As noted above, a social security claimant must have a severe impairment (or
7 combination of impairments) that significantly limits the physical or mental ability to do basic
8 work activities, or they are found not disabled. *See* 20 C.F.R. § § 404.1520(c), 416.920(c). If the
9 ALJ finds the claimant has an impairment(s) that is severe, the ALJ will proceed to step three.
10 An impairment is not severe if it does not significantly limit the claimant's physical or mental
11 ability to do basic work activities, which are defined as the abilities and aptitudes to do most
12 jobs, such as: (1) walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or
13 handling; (2) seeing, hearing, and speaking; (3) understanding, carrying out, and remembering
14 simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers
15 and usual work situations; and (6) dealing with changes in a routine work setting. *See* 20 C.F.R.
16 § § 404.1521, 416.921. The claimant must prove the physical or mental impairment by providing
17 medical evidence consisting of signs, symptoms and laboratory findings; the claimant's own
18 statement of symptoms alone will not suffice. *See* 20 C.F.R. § § 404.1508, 416.908.

19 "A determination that an impairment(s) is not severe requires a careful evaluation of the
20 medical findings which describe the impairment(s) and an informed judgment about its limiting
21 effects on the individual's physical or mental ability(ies) to perform basic work activities; thus,
22 an assessment of function is inherent in the medical evaluation process itself." SSR 85-28, 1985
23 WL 56856, at * 4 (1985). "An impairment or combination of impairments may be found 'not
24 severe *only if* the evidence establishes a slight abnormality that has no more than a minimal
25 effect on an individual's ability to work.'" *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005)
26 (quoting *Smolen*, 80 F.3d at 1290) (emphasis original in *Webb*); *see also* SSR 85-28, 1985 WL
27 56856, at * 3 (1985). The step two inquiry is "a 'de minimis screening device [used] to dispose
28 of groundless claims,' ... and an ALJ may find that a claimant lacks a medically severe

1 impairment or combination of impairments only when his conclusion is ‘clearly established by
2 medical evidence.’” *Webb*, 433 F.3d at 687 (quoting *Smolen*, 80 F.3d at 1290).

3 The record is devoid of mental health treatment records, although Dr. Wildman indicated
4 and Plaintiff testified that she did undergo several months of outpatient treatment in 1994. (AR
5 108, 321.) In addition, Plaintiff’s physicians noted diagnoses of depression and anxiety on
6 various occasions. (*See* AR 288, 292, 293, 369, 370, 373, 374, 375, 394, 398, 405, 459, 461, 462,
7 463, 476, 477.)

8 After filing her applications, Plaintiff underwent a psychological evaluation with
9 Dr. Wildman on July 26, 2010. (AR 321-26.) Plaintiff complained of difficulty concentrating and
10 with her memory, troubling thoughts about money and about what her children would do when
11 she was gone. (AR 321.) She identified as depressed, rating herself at a seven on a ten point
12 depression-severity index. (AR 321.) She reported that she eats when depressed, cries and
13 worries a lot. (AR 321.)

14 Dr. Wildman then described the event in 1993 that led to Plaintiff’s mental impairments:
15 In 1993, Plaintiff’s then-husband was watching her children, and killed one of them and
16 attempted to kill the others. (AR 322.) Plaintiff indicated that she continues to dream about the
17 murder of her son, which Dr. Wildman concluded was consistent with PTSD. (AR 322.)
18 Dr. Wildman described the situation as follows: “[T]he apparent reluctance of this patient to get
19 into this aspect of her past in my mind speaks to the strength of her defenses against conscious
20 recognition of the fact and its consequences to her, *something which is undoubtedly undermining*
21 *her mental stability*.” (AR 322 (emphasis added).) While Dr. Wildman noted that Plaintiff did
22 “not resemble a severely ill psychiatric case in that no disturbances were noted in her affect or
23 behavior,” she “appears to be more psychologically disturbed than she herself recognizes.” (AR
24 324-25.) Dr. Wildman went on to say that it was “reasonably clear that there is unrecognized
25 anxiety which is of a post-traumatic nature in this case and that it does not only interfere with
26 Lorraine’s general life, but we saw the interference of this unrecognized anxiety in her careless
27 mistakes on the mathematical tasks[.]” (AR 325.)
28

1 Dr. Wildman opined that Plaintiff could understand, remember and carry out simple and
2 detailed but not complex instructions, and was mildly to moderately impaired in her ability to
3 interact appropriately with coworkers, supervisors and the public due to her unrecognized
4 anxiety. (AR 325.) He further opined that she was moderately impaired in her ability to maintain
5 concentration and attention, and that these difficulties would interfere with tasks of any great
6 complexity. (AR 325.) He stated: "I think it is very clear that this woman needs to be enrolled in
7 mental health treatment on a most urgent basis. I believe this is a case in which a great deal of
8 exploratory work involving insight-oriented psychotherapy will need to be conducted before any
9 attempt is made to press this woman to try to function at a significantly higher level in life." (AR
10 326.)

11 On August 26, 2010, reviewing agency psychologist Dr. Kotler opined Plaintiff has
12 moderate difficulties in maintaining social functioning; moderate difficulties in maintaining
13 concentration, persistence or pace; that she was able to understand, carry out and maintain
14 concentration and attention to carry out and complete simple tasks; and that she should be
15 limited to work without direct public contact. (AR 327-343.) She can interact appropriately in
16 brief, casual encounters with the public. (AR 343.)

17 On December 6, 2010, reviewing agency psychologist Dr. Pastroa Roldan affirmed the
18 evaluative findings of Dr. Wildman. (AR 366.)

19 Plaintiff testified at the hearing about the incident, stating that her then-husband
20 murdered her son and his mentally handicapped brother, and attempted to murder and injured her
21 other son and daughter. (AR 102-103.) She believes that if she would have been in the house, she
22 could have saved them. (AR 102-103.) Her ex-husband was prosecuted and put to death for his
23 crimes. (AR 102.) She testified that her depression affected her in the workplace because she did
24 not talk to people in the workplace, and in addition, it caused problems for her at home. (AR
25 103-04.) She continues to experience depression and blames herself for not being there to stop
26 the events that occurred that day. (AR 104.) She went to counseling right after the incident, but
27 then did not go back, stating that it "just didn't work." (AR 106.) She testified the counselor told
28 her to just try to move on. (AR 108-09.) She affirmed Dr. Wildman's notion that she tried to

1 avoid talking about the incident. (AR 106.) She confirmed that she was not getting counseling
2 and was not sure whether she would do so, although she was taking medication for depression.
3 (AR 107-08.)

4 The ALJ found that Plaintiff had no limitations in her activities of daily living. (AR 21.)
5 She found Plaintiff had mild limitations in social functioning, because Plaintiff spends time with
6 her family and speaks with a daughter who lives in Los Angeles. (AR 21.) The ALJ recounted
7 that Plaintiff worked as an apartment manager for thirteen years, and developed skills in
8 customer service. (AR 21.) The ALJ similarly found Plaintiff only had mild limitation in
9 concentration, persistence or pace, finding that she could concentrate well enough to sew, watch
10 television, cook, drive and read, and she was able to work despite her symptoms of PTSD and
11 depression. (AR 21.)

12 The court agrees with Plaintiff that the ALJ erred in finding her mental impairments not
13 severe at step two. As indicated above, the ALJ could only find her mental impairments severe if
14 the “evidence establishe[d] a slight abnormality that ha[d] no more than a minimal effect on an
15 individual’s ability to work,” *Webb*, 433 F.3d at 686, and if the determination was clearly
16 supported by the medical evidence. In this case, the ALJ’s determination that Plaintiff’s mental
17 impairments had no more than a minimal effect on her ability to work is not clearly supported by
18 the medical evidence.

19 While there are no mental health treatment notes in the record, the ALJ acknowledged
20 Plaintiff’s mental impairments of PTSD and depression stemming from a traumatic and tragic
21 event in 1993 where Plaintiff’s then-husband murdered one of her children and attempted to
22 murder others. The consultative examining and reviewing psychologists concurred that
23 Plaintiff’s mental impairments had more than a minimal effect on her ability to function in a
24 work setting. Dr. Wildman reiterated again and again that Plaintiff did not even realize the extent
25 or her anxiety which impacted her ability to function which appears to itself be a symptom of her
26 condition. Therefore, the ALJ’s decision is not supported by the medical evidence.

27 The Commissioner argues that the ALJ did not impermissibly substitute her opinion for
28 that of the doctors because the RFC is the ALJ’s exclusive purview. (Docs. # 18/19 at 5.) While

1 the ALJ is responsible for determining a claimant's RFC, the ALJ's determination that an
2 impairment is not severe at step two must be "clearly established by medical evidence," and
3 here, the medical evidence is directly contrary to the ALJ's finding.

4 Therefore, the ALJ erred in not finding Plaintiff's mental impairments severe at step two.
5 The court must now address whether that error was harmless as the Commissioner argues.
6 The Ninth Circuit recently confirmed that harmless error analysis applies in Social Security
7 cases. *Marsh v. Colvin*, --- F.3d ---, 2015 WL 4153858, at * 2 (9th Cir. July 10, 2015).
8 "ALJ errors in social security cases are harmless if they are 'inconsequential to the ultimate
9 nondisability determination' and ... 'a reviewing court cannot consider [an] error harmless unless
10 it can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could
11 have reached a different disability determination.'" *Id.* at * 2-3 (quoting *Stout v. Comm'r, Soc.*
12 *Sec. Admin.*, 454 F.3d 1050, 1055-56 (9th Cir. 2006)).

13 [W]here the circumstances of the case show a substantial likelihood of prejudice,
14 remand is appropriate so that the agency can decide whether re-consideration is
15 necessary. By contrast, where harmlessness is clear and not a borderline question,
16 remand for reconsideration is not appropriate.

17 *McLeod v. Astrue*, 640 F.3d 881, 888 (9th Cir. 2011). "[T]he more serious the ALJ's error, the
18 more difficult it should be to show the error was harmless." *Marsh*, 2015 WL 4153858, at * 3.

19 The Commissioner argues that the doctors who assessed Plaintiff's mental impairments
20 concluded that despite some mild and moderate limitations, Plaintiff could still perform simple,
21 repetitive tasks and an RFC for simple work accommodates moderate limitations in several areas
22 of mental functioning, including the ability to maintain concentration and attention, which is
23 consistent with the ALJ's step-four finding that Plaintiff could perform her past relevant work
24 and step five finding that she could perform other work in the national economy. (Docs. # 18/19
25 at 5-6, n. 2.)

26 The court's harmless error analysis regarding the ALJ's step two determination depends
27 on the propriety of the ALJ's determinations at steps four and five, which Plaintiff also
28 challenges. Therefore, the court will defer its harmless error analysis of the ALJ's step two
determination until after it addresses whether the ALJ erred or should be affirmed at subsequent
steps.

D. Past Relevant Work

If the ALJ does not find a claimant disabled at steps one through three, the ALJ will consider the RFC and past relevant work at step four in determining whether the claimant is disabled. 20 C.F.R. §§ 404.1560(a), 416.960(a).

A VE may offer testimony regarding “whether a person with the physical and mental limitations imposed by the claimant’s medical impairment(s) can meet the demands of the claimant’s previous work, either as the claimant actually performed it or as generally performed in the national economy.” 20 C.F.R. §§ 404.1560(b)(2), 416.960(b)(2). If the claimant is found to be able to have the RFC to perform past relevant work the claimant will be found to be not disabled. 20 C.F.R. §§ 404.1560(b)(3), 416.960(b)(3).

The VE identified Plaintiff’s past relevant work as follows: (1) resident manager from 1994 until 2007, DOT 186.167-018 (light work); (2) housekeeper, DOT 323.687-014 (light work); and (3) floor clerk, DOT 299.677-010 (light work). (AR 109.)

The ALJ then posed the following limitations to the VE: an individual who would be 59 as of the alleged onset date; educated through twelfth grade; with the past relevant work identified; a medium level work restriction; restrictions that she avoid climbing and working at heights; restrictions limiting her to occasional posturals and avoiding hazards (working at heights or operating dangerous moving machinery). (AR 110-11.) The ALJ specifically stated that she was not giving any mental limitations, and asked the VE whether in light of these limitations, Plaintiff could still perform any of her past relevant work. (AR 111.) The VE testified that Plaintiff could still perform all three of the jobs identified as past relevant work.

1. Housekeeper Position-Within Fifteen Years

Plaintiff performed her work as a housekeeper prior to 1994. (Doc. # 17-1 at 7; AR 86, 109.)

The regulations provide, in pertinent part:

We do not usually consider that work you did 15 years or more before the time we are deciding whether you are disabled (or when the disability insured status requirement was last met, if earlier) applies. A gradual change occurs in most jobs so that after 15 years it is no longer realistic to expect that skills and abilities

1 acquired in a job done then continue to apply. The 15-year guide is intended to
2 insure that remote work experience is not currently applied.

3 20 C.F.R. § 404.1565(a); 20 C.F.R. § 416.965(a). The Commissioner is correct that the
4 regulations do not preclude considering past relevant work older than fifteen years; instead,
5 fifteen years is the time frame usually considered by the agency. 20 C.F.R. § 404.1565(a); 20
6 C.F.R. § 416.965(a); *see also* SSR 82-62 at * 1, 1982 WL 31386 (1982). The regulation also
7 states that where an applicant has “acquired skills through your past work, we consider you to
8 have these work skills unless you cannot use them in other skilled or semi-skilled work that you
9 can now do.” *Id.* Social Security Ruling 82-62 similarly provides that “[t]he 15-year guide is
10 intended to insure that remote work experience which could not reasonably be expected to be of
11 current relevance is not applied.” SSR 82-62 at * 2, 1982 WL 31386 (1982).

12 At step four, “claimants have the burden of showing that they can no longer perform their
13 past relevant work.” *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001). “Although the
14 burden of proof lies with the claimant at step four, the ALJ still has a duty to make the requisite
15 factual findings to support his conclusion.” *Id.* The ALJ will compare the assessed RFC with the
16 claimant’s past relevant work, which is defined as work the claimant has done within the last
17 fifteen years, which lasted long enough for the claimant to learn to do it, and was substantial
18 gainful activity. *See* 20 C.F.R. § § 404.1560(b), (b)(1), 416.960(b), (b)(1), 404.1565(a),
19 416.965(a).

20 Here, the ALJ concluded that all of Plaintiff’s prior work was within fifteen years of the
21 alleged onset date. (AR 25.) The ALJ assessed Plaintiff’s RFC and referred to the VE’s
22 testimony that Plaintiff is able to perform the past relevant work as actually and generally
23 performed in concluding that Plaintiff is able to perform this past relevant work. (AR 25-26.)

24 Plaintiff performed the housekeeping position prior to the resident manager position,
25 which she began in 1994. (AR 109.) Thus, the housekeeper position is outside of the fifteen year
26 window, which “is generally the 15 years prior to the time of adjudication at the initial,
27 reconsideration or higher appellate level.” SSR 82-62 at * 2, 1982 WL 31386 (1982).

28 The court concludes that even if the ALJ erred in stating that the housekeeper position
was within the fifteen year period, the error is harmless because the ALJ is not precluded from

1 considering evidence outside the fifteen year window, particularly when the it is reasonable to
2 think that the work experience is still of current relevance. Here, there is no evidence that the
3 skills and abilities acquired as a housekeeper do not still apply to the position generally, more
4 than fifteen years later. Nor has Plaintiff demonstrated that the specific skills she acquired as a
5 housekeeper more than fifteen years ago cannot be utilized in performing work as a housekeeper
6 currently. This conclusion is reaffirmed by the fact that the housekeeping position qualifies as
7 unskilled work which is defined as that “which needs little or no judgment to do simple duties
8 that can be learned on the job in a short period of time.” 20 C.F.R. § 404.1568.

9 The question now becomes whether the ALJ erred in not posing any mental limitations to
10 the VE in asking the VE to identify past relevant work Plaintiff could still perform, or whether
11 any such error was harmless.

12 Once again, Dr. Wildman opined that Plaintiff could understand, remember and carry out
13 simple and detailed but not complex instructions, and was mildly to moderately impaired in her
14 ability to interact appropriately with coworkers, supervisors and the public due to her
15 unrecognized anxiety. (AR 325.) He further opined that she was moderately impaired in her
16 ability to maintain concentration and attention, and that these difficulties would interfere with
17 tasks of any great complexity. (AR 325.) Reviewing agency psychologist Dr. Kotler opined
18 Plaintiff has moderate difficulties in maintaining social functioning; moderate difficulties in
19 maintaining concentration, persistence or pace; that she was able to understand, carry out and
20 maintain concentration and attention to carry out and complete simple tasks; and that she should
21 be limited to work without direct public contact. (AR 327-343.) Dr. Kotler concluded Plaintiff
22 can interact appropriately in brief, casual encounters with the public. (AR 343.) Reviewing
23 agency psychologist Dr. Pastora Roldan affirmed these opinions. (AR 366.)

24 The ALJ did not find Plaintiff’s mental impairments to be severe at level two, but was
25 still required to consider these impairments in assessing Plaintiff’s RFC and ability to do past-
26 relevant work in subsequent steps. *See* 20 C.F.R. § § 404.1545(a)(2), 41.945(a)(2). The ALJ did
27 address Plaintiff’s mental impairments at step four, and once again found that the evidence
28 showed her mental symptoms did not significantly interfere with her ability to work. (AR 24.) In

1 addition, the ALJ assigned little weight to the opinions of Dr. Wildman and the State agency
2 psychological consultants, finding that they overlooked Plaintiff's past work history and
3 activities of daily living, which the ALJ found established Plaintiff could in fact concentrate well
4 enough to perform the required tasks and interact with others. (AR 24-25.)

5 Even if the court determined that the ALJ erred in rejecting the opinions of Dr. Wildman
6 and the State agency psychological consultants at step four, the court concludes that error is
7 harmless because the past relevant work position of housekeeper is consistent with the mental
8 limitations imposed by these doctors.

9 The housekeeping position has a DOT reasoning level of one, which requires the individual to
10 "[a]pply commonsense understanding to carry out simple one-or two-step instructions" and
11 "[d]eal with standardized situations with occasional or no variables in or from these situations
12 encountered on the job." DOT 323.687-014. In addition, the position would not involve
13 significant interaction with people in terms of taking instructions or helping people. *Id.*

14 The doctors found Plaintiff mildly to moderately limited with respect to concentration,
15 persistence or pace such that she should be limited to simple tasks, and these limitations are
16 consistent with the demands imposed by the housekeeping position. In addition, the doctors
17 found Plaintiff to be moderately limited in her ability to interact with others, and the
18 housekeeping position requires no significant interaction with others. Notably, Plaintiff does not
19 argue that the housekeeper position would be excluded due to her mental limitations; she only
20 made that argument with respect to the resident manager position. (Doc. # 17-1 at 6-9.)

21 Therefore, any error made by the ALJ in finding these opinions were not severe at step
22 two or in rejecting these opinions at step four is harmless. Plaintiff is able to perform past
23 relevant work as a housekeeper, which results in the conclusion that she is not disabled.
24 20 C.F.R. § 404.1520(f) and § 416.920(f); *see also Berry*, 62 F.3d at 131 ("Generally, a claimant
25 who is physically and mentally capable of performing past relevant work is not disabled, whether
26 or not he could actually obtain employment.").

